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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,	:	CIVIL ACTION
	:	NO. 00-2041
Plaintiff,	:	
v.	:	
PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES BERNUTH, an individual, and JOHN HERKLOTZ, an individual,	:	
Defendants.	:	

DEFENDANT HERKLOTZ'S BRIEF IN SUPPORT OF RESPONSE TO PLAINTIFF WRS' MOTION FOR SUMMARY JUDGMENT AS TO DAMAGES

Defendant, JOHN HERKLOTZ, by his attorneys, John P. Sieminski, Esq., Chad A. Wissinger, Esq., and BURNS, WHITE & HICKTON, LLC, sets forth the following Brief in Support of Response to Plaintiff WRS, Inc.'s Motion for Summary Judgment as to Damages, of which the following is a statement:

I. FACTUAL BACKGROUND

In 1996, Eric Parkinson formed Plaza Entertainment, Inc. ("Plaza") for the purpose of, among other things, distributing and selling videocassettes that were to be reproduced by entities such as WRS, Inc. ("WRS"). By 1998, WRS asserted that Plaza owed it in excess of $150,000.00. Nonetheless, Plaza continued to place orders and make demands upon WRS for the fulfillment of those orders, and WRS continued performing services for Plaza, allegedly without payment. In April of 1998, Plaza requested that WRS reproduce a film titled "Giant of Thunder Mountain."

At this point in time, WRS asserts that it sought a personal guaranty of Defendant Herklotz, and the completion of a Credit Application by Parkinson, prior to fulfilling the Giant of Thunder Mountain order. Although WRS had started duplicating the Giant of Thunder Mountain order, Defendant Herklotz immediately returned a signed copy of the guaranty, Parkinson delayed, by months, the period for submission of the credit application. Despite this delay, WRS extended significant additional credit to Plaza by fulfilling the Giant of Thunder Mountain order, creating significant liability for Herklotz under his personal guaranty, and despite not having received any materials from Plaza that would suggest that Plaza was creditworthy. (May 6, 1998 Guaranty, Appendix 18.)

Although not surprising given its past failures to pay WRS, Plaza did not fully and timely pay WRS for the services provided in reproducing the Giant of Thunder Mountain. In an attempt to rectify the payment deficiencies, Plaza and WRS, without knowledge of Defendant Herklotz, engaged in the negotiation of an agreement that they (WRS and Plaza) referred to as a "Services Agreement." After several months of negotiation, the Services Agreement was finalized and executed on October 12, 1998. As part of the duties described in the Services

Agreement, WRS took over the billing and collection of receivables for Plaza, and set up a lock box account for that purpose. (October 12, 1998 Services Agreement, Appendix 16.)

Despite the lockbox procedure, WRS asserts that it was unable to collect significant monies, monies that it now alleges it is owed as damages. As a result, the various contractual relationships between WRS and Plaza terminated, and this litigation was commenced. Default judgments have been entered against Plaza and Parkinson, the true bad actors in this litigation, although no attempts have been made to collect from these entities. Instead, WRS has chosen to attempt to enforce its entire debt against Herklotz. WRS has proceeded in this manner despite its failure to timely seek Parkinson's credit application, its own wholesale failures to make collection under the Services Agreement, and its commercially unreasonable decisions to continue extending credit to an entity that, from the very day the original business relationship was commenced in 1996, failed to make timely payment of its accounts.

Defendant Herklotz has asserted that he is not liable for the debts of Plaza for these reasons, but WRS obtained summary judgment with regard to Herklotz's liability several months ago. Notwithstanding the granting of summary judgment to WRS on Defendant Herklotz's personal liability under the guaranty, significant issues of triable fact remain with regard to the appropriate measure of damages applicable to Defendant Herklotz, and whether those damages may be further abated due to WRS' own conduct.

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II. APPLICABLE LEGAL STANDARDS FOR SUMMARY JUDGMENT AND RECOVERABILITY OF DAMAGES

A. Standard for Summary Judgment

In considering a Motion for Summary Judgment, the Court must view the facts in a light most favorable to the non-moving party. See Doe v. Centre County, 242 F. 3d 437 (3d Cir. 2001). Summary judgment may only be appropriately entered where there is both no issue of material fact and the moving party is entitled to judgment as a matter of law. See F.R.C.P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed.2 265 (1986). Stated another way, in ruling upon a Motion for Summary Judgment, a court must examine the record in the light most favorable to the nonmoving party and resolve all doubt against the moving party. See Bleam v. Gateway Professional Ctr. Assocs., 431 Pa. Super. 145, 636 A.2d 172, alloc. denied, 538 Pa. 639, 647 A.2d 895 (1994); Roland v. Kravoc, Inc., 355 Pa. Super. 493, 513 A.2d 1029 (1986), alloc. denied, 517 Pa. 599, 535 A.2d 1058 (1987).

B. Standard for Proving Recoverability of Damages

With regard to the proper measure of damages in this case, WRS bears the burden of proving damages with reasonable certainty. Generally defined, damages are reasonable compensation for the loss or injuries suffered. Although damages need not be proven with mathematical certainty, WRS bears the burden of demonstrating that its damages directly resulted from actions of Plaza and/or Defendant Herklotz. John F. Harkins Co., Inc. v. School District of

Philadelphia, 313 Pa.Super. 425, 460 A.2d 260 (1983); Reimer v. Tien, 356 Pa.Super. 192, 514 A.2d 566 (1986); Coleco Industries, Inc. v. Berman, 423 F.Supp. 275 (E.D. Pa. 1976), *affd. in part, rem'd in part* 567 F.2d 569 (3d Cir. 1979); Wojcik v. Yorktowne Dental Assoc., 701 A.2d 581 (1997).

Additionally, a party to a contract who suffers damage by reason of another's breach of the contract may not allow his damages to accrue when he could reasonably prevent their increasing. A party to a contract having control of an item of damage has a duty to lessen or mitigate his damages by acting reasonably. Day & Zimmermann, Inc. v. Blocked Iron Corp. of America, 200 F.Supp. 132 (D.C. Pa. 1961); Ecksel v. Orleans Construction Company, 360 Pa.Super. 119, 519 A.2d 1021 (1987); APCL & K, Inc. v. Richer Communication, Inc., 241 Pa.Super. 396, 361 A.2d 762 (1976).

If WRS is partly responsible for a claimed damage amount of item, such responsibility acts as a complete bar to any claim for such damage against Defendant Herklotz. See Oak Ridge Const. Co. v. Tolley, 504 A.2d 1343 (Pa. Super. 1985) (a party that materially breaks a contract cannot recover damages in breach of contract); Trumbull Corp. v. Boss Construction, Inc., 801 A.2d 1289, 1292 (Pa. Commw. 2002) (a party seeking to recover damages for breach of contract must prove that it performed its obligations under the contract); Armour and Co. v. Scott, 360 F.Supp. 319, 325 (W.D. Pa. 1972) (if both parties to a contract materially breach a contract, neither party can recover under a breach of contract theory).

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III. ARGUMENT

A. The Nature and Quality of the Work Conducted by Schneider Downs, in and of Itself, Creates Material Issues of Fact Entitling Defendant Herklotz to a Trial Regarding the Appropriate Measure of Damages

With regard to its Motion for Summary Judgment on Damages, WRS has essentially asserted that the findings of Schneider Downs, through Thomas Claasen and John Briggs, are dispositive and that Defendant Herklotz has no defenses to, or arguments against, the Schneider Downs calculations. Given the lack of scope of the Schneider Downs investigation, in particular the wholesale failure of Schneider Downs to investigation the allegations put forth by Defendant Herklotz with regard to WRS' billing practices, nothing could be further from the truth. (October 6, 2006 Schneider Downs Report, Appendix 3.)

Although Schneider Downs engaged in a mechanical process of "ticking and tying" some elements of WRS' records for internal consistency, even a brief review of the Schneider Downs Report indicates that the Report itself sets forth a number of issues that present genuine issues of material fact as to the method that Schneider Downs employed and the questions that the Schneider Downs Report does not even address, let alone answer. See Affidavit of John Herklotz, Appendix 25.

For example, a review of all WRS' records indicates that businesses controlled and/or operated by defendants Parkinson and von Bernuth (the "Parkinson Affiliates") had separate commercial relationships with WRS during the period 1998 through 2001. Schneider Downs' examination of the books and records of WRS did not attempt to ascertain whether services provided to the Parkinson Affiliates were invoiced to Plaza, or that payments made by Plaza applied to obligations of the affiliate companies. It is Defendant Herklotz's contention that Messrs. Parkinson and von Bernuth routinely ignored corporate formalities in connection with the operation of their various businesses, and may have deliberately caused the reported amounts owing by Plaza to be in error, with or without the active participation by WRS. Schneider Downs failure to investigate these allegations raises serious questions as to the accuracy of the analysis and conclusions in the Schneider Downs Report. (October 6, 2006 Schneider Downs Report, Appendix 3.)

B. Defendant Herklotz's Pleadings, and the Discovery Taken to Advance the Defense of this Matter, Creates Material Issues of Fact Entitling Defendant Herklotz to a Trial Regarding the Appropriate Measure of Damages

1. Defendant Herklotz's Initial Pleadings Raise Material Issues of Fact Concerning Damages

In addition to the criticisms specific to the Schneider Downs report itself, Defendant Herklotz has pleaded and presented evidence that creates genuine issues of material fact that the amounts shown on the business records of WRS are not, in fact, the amounts owed, and thus guaranteed, by Herklotz. At the beginning of this case, Defendant Herklotz filed an Answer and Affirmative Defenses that created multiple issues of material fact relative to damages. In his initial pleading filed with this Court, Defendant Herklotz asserted that the execution of the Services Agreement, and other actions taken by and between WRS and Plaza without Defendant Herklotz's knowledge, made such material alterations to his responsibility under the guarantee as to render the guarantee a nullity such that no, or at least significantly minimized, payments would be required by Defendant Herklotz. (February 4, 2005 Answer and Affirmative Defenses of Defendant John Herklotz, Appendix 4.)

With regard to that point, it is indisputable that the Services Agreement is an agreement separate and apart from the original relationship between WRS and Plaza, and that it significantly increased Mr. Herklotz's risk, who had signed on only to guaranty the original relationship. (October 12, 1998 Services Agreement, Appendix 16.) Instead of being obliged to pay Plaza's outstanding balance for WRS' duplication, manufacture and fulfillment services, defendant Herklotz is now expected to pay for WRS' management of Plaza operations, for debts that WRS incurred while managing Plaza, for WRS' legal fees, for expenses associated with collecting Plaza's bills, marketing Plaza's surplus video titles, maintaining Plaza's bank accounts and for tracking Plaza's records. His risk has ballooned without any notice to him. Defendant Herklotz's guaranty never contemplated that Plaza's debts would be compounded by WRS managerial control of Plaza and collection services on behalf of Plaza. (May 6, 1998 Guaranty, Appendix 18.)

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As was noted in the legal summary section of this brief, the Plaintiff in an action for breach of contract has the burden of proving damages resulting from the breach. Spang v. U. S. Steel Corporation, 545 A.2d 861 (Pa. 1988). Further, damages are not recoverable if they are too speculative, vague or contingent and are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty. See Restatement (Second) of Contracts, § 352; Murray on Contracts, § 226. Given the changed dynamic instituted with the execution of the Services Agreement, WRS cannot meet its burden of proving that Plaza's continued losses are the responsibility of Defendant Herklotz.

2. Defendant Herklotz's Subsequent Court Filings Further Advanced Additional Issues of Material Fact Concerning Damages

Defendant Herklotz filed a Motion for Summary Judgment that sought a ruling to the effect that WRS' damages were fraught with material issues of fact such that the calculation of damages with certainty was rendered an impossibility. (February 24, 2006 Motion for Summary Judgment of Defendant John Herklotz, Appendix 5.) Although Herklotz did not prevail on his Motion for Summary Judgment with regard to this issue, he has raised significant issues of fact and is entitled, under the current state of Pennsylvania law, to a trial of these issues in open court, and the opportunity to call and cross-examine witnesses with regard to their roles as to the measure of damages he should properly pay under his personal guaranty. Defendant Herklotz's failure to prevail on this point at the summary judgment phase that addressed liability bears no significance to his right to raise these issues, cross examine witnesses, and otherwise defend himself at a damages trial. In paragraph 22 of Defendant Herklotz's Motion for Summary Judgment, he raised the following genuine issues of material fact:

> WRS and Plaza's documents, for which WRS was responsible pursuant to the Services Agreement, are missing, have not been produced, or were never created in the first instance. Examples include the following:
>
> a. Plaza's earliest purchase orders with WRS, detailing the quantities ordered, the titles duplicated and the Plaza customers to whom they were shipped, were not kept after production (Napor Deposition, pp. 66:12-25, 67:1-21, Appendix 6.);
>
> b. Mr. Napor estimates that the volume of business that WRS performed for Plaza prior to the July 24, 1998 date cited in the Complaint was *approximately* $121,000, but *could have been* more. (Napor Deposition p. 74:8-22, Appendix 7.);
>
> c. WRS has not produced or cannot produce any document indicating that an account receivable was owed to WRS by Plaza as of July 24, 1998, the date of the submission of the updated account application/ Credit Application upon which the instant lawsuit is premised. "[W]e can't find what you're asking for in July." (Napor Deposition, pp. 77:16-25, 78:2-25, Appendix 8.);
>
> d. WRS cannot ascertain whether Plaza's account balance as of August 31, 1998, the date designated by the July 24, 1998 Account Application when Plaza was to fully pay its outstanding balance, was $685,379 as pleaded in the Complaint or $720,679 as indicated on an August 31, 1998 account statement marked as Napor Deposition Exhibit No. 4. (Napor Deposition Exhibit No. 4; Appendix 9.);
>
> e. Explaining reasons why so many records are not provided or cannot be located, Mr. Napor stated, "Over the time, and we haven't been a fully functional business, ... [S]omewhere along the line we have lost track of some paperwork because I remember it being much more voluminous that we have now, but I also don't think there was

anything germane. I think we have all the important stuff here." Napor Deposition, pp. 107:23-24, 108:4-10, Appendix 10.);

f. August 26, 2001 *Pittsburgh Post Gazette* interview of Jack Napor regarding WRS record keeping problems; (Post Gazette interview of Jack Napor dated August 26, 2001, Appendix 11.);

g. Mr. Napor, whose knowledge is imputed to WRS by virtue of his corporate designee status, stated that he had no understanding of the total amount of money that was deposited into the lockbox account. (Napor Deposition, pp. 144:3-6, 198:7-25, 199:2-3, Appendix 12.);

h. When asked to produce all documents demonstrating that WRS billed Plaza during the seventeen (17) month period that WRS performed administrative services rendered pursuant to the Services Agreement, WRS states there were "none." See WRS's Response to Request No. 5 of Herklotz' Second Request for Production of Documents; (Appendix 13); and

i. Beginning in January 2000, problems with WRS's new computer software system resulted in frequent errors including: over billing and under billing clients and adding 0's unpredictably to either the quantity of products ordered or the unit prices, inflating the value of the invoices. (Napor Deposition, pp 226:11-25, 227:2-13, Appendix 14.)

For these reasons, it is intellectually dishonest for WRS to aver that, prior to its Motion for Summary Judgment as to Damages, Herklotz had not placed anything on the record to create a genuine issue of material fact as to damages.

As indicated in the legal summary section of this Brief, WRS must act in a commercially reasonable manner once it became aware of a possible claim against Defendant Herklotz under his personal guaranty. Despite this basic tenet of Pennsylvania law regarding damages, WRS, while it was actively performing additional work for Plaza, was well aware that it was not being paid for work already performed, let alone being paid for work currently being performed. As such, Defendant Herklotz is entitled to put forth a case attacking the appropriateness of the additional indebtedness incurred by WRS from the time he first signed his personal guaranty for the benefit of Plaza.

C. Filings by WRS in This Action, and Discovery Conducted to Date, Raises Additional Issues of Material Fact with Regard to the Proper Measure of Damages

Additional issues of material fact surround the affidavit of Jack Napor that was filed in support of Plaintiff's Motion for Summary Judgment on Damages. Specifically, while Jack Napor, on behalf of WRS, filed an affidavit that purports to demonstrate the amount WRS believes it is owed from Defendant Herklotz, the admissions made by Mr. Napor, under oath during his deposition, call into question the sworn conclusions alleged by Mr. Napor in his affidavit, and further raise issues of fact appropriate for trial with regard to the proper measure of damages, if any, in this matter. (Affidavit of Jack Napor, Appendix 15.)

Examples of these inconsistencies include, but are not limited to, the following. In his deposition, Mr. Napor testified that WRS had not produced and could not produce any document indicating that an account receivable was owed to WRS by Plaza as of July 24, 1998, the date of the submission of the updated Account Application upon which the instant lawsuit is premised. Specifically, Mr. Napor stated that "[W]e can't find what you're asking for in July." See Napor Deposition, pp. 77:16-25, 78:2-25, Appendix 8. Despite this admission, Mr. Napor's affidavit, which attempts to confirm the total amount owed to WRS, includes amounts prior to the Credit Application as due and owing, and seeks payment by Defendant Herklotz for the same.

Additionally, WRS cannot ascertain whether Plaza's account balance as of August 31, 1998, the date designated by the July 24, 1998 Account Application when Plaza was to fully pay its outstanding balance, was $685,379 as pleaded in the Complaint or $720, 679 as indicated on an August 31, 1998 account statement marked as Napor Deposition Exhibit No. 4. (Appendix 9.) Explaining reasons why so many records are not provided or cannot be located, Mr. Napor stated, "Over the time, and we haven't been a fully functional business, ... [S]omewhere along the line we have lost track of some paperwork because I remember it being much more voluminous that we have now …." See Napor Deposition, pp. 107:23-24, 108:4-10, Appendix 10. This issue was acknowledged when the Pittsburgh Post-Gazette published an article on August 26, 2001, in which Mr. Napor was interviewed concerning WRS' record-keeping problems. (Pittsburgh Post Gazette interview of Jack Napor dated August 26, 2001, Appendix 11.) To further confound this issue, when Defendant Herklotz specifically requested that WRS "state all payments made to WRS on behalf of Plaza" in its first set of interrogatories, WRS, rather than itemize those payments in response, simply stated that "payments were made by Plaza and Plaza Entertainment customers." This loss of information, whether inadvertent, accidental, intentional or otherwise, is a material issue of fact that goes to the heart of the reliability of WRS' records, and thus the proper amount, if any, that must be paid by Defendant Herklotz.

Mr. Napor, whose knowledge is imputed to WRS by virtue of his corporate designee status, stated that he had no understanding of the total amount of money that was deposited into the lockbox account. See Napor Deposition, pp. 144:3-6, 198:7-25, 199:2-3, Appendix 12. Yet, in his affidavit, Mr. Napor disingenuously states, without detailing any of the transactions involved, or any of the amounts associated with the transaction, that "there is no record of the National Bank of Canada receiving any payment from a Plaza Entertainment, Inc. or its customers that is not accounted for in the records of WRS." (Affidavit of Jack Napor, Appendix 15.) Based on a comparison of the affidavit and the deposition transcript, it appears that Mr. Napor is unable to determine if, whether, and in what amount, any payment was received through the lockbox. This creates issues of material fact with regard to Defendant Herklotz's damages, as WRS, pursuant to the Services Agreement, was charged with maintaining, accounting, and collecting payments made to the lockbox. The absence of records with regard to payments received, in addition to creating issues of material fact that should preclude summary judgment, should act to reduce Defendant Herklotz's liability to WRS.

Additionally, when asked to produce all documents demonstrating that WRS billed Plaza during the seventeen (17) month period that WRS performed administrative services rendered pursuant to the Services Agreement, WRS states there were "none." See WRS's Response to Request No. 5 of Herklotz' Second Request for Production of Documents. (Appendix 13) Yet, in his affidavit, Mr. Napor asserts that WRS is entitled to be paid $125,000.00 for "rendered services" under the Services Agreement, despite his earlier admission that there is no documentation to support the proposition that any services were actually rendered during this period. Again, to further confuse this issue, WRS stated in response to Defendant Herklotz's First Set of Interrogatories, that it performed services including "order processing, invoicing, collections and customer service," yet no documents are available to quantify these amounts, or the manner in which they might reduce Defendant Herklotz's liability. In an attempt to clarify this answer, Defendant Herklotz asked for more specific information in its Second Set of Interrogatories, only to a receive a response indicating "that amounts paid into the lockbox at no time exceeded the amount due WRS for the dubs produced and shipped...," again without any total of the same.

Moreover, beginning in January 2000, which is the period in time preceding the expiration of the Services Agreement, problems with WRS's new computer software system resulted in frequent errors, including over billing and under billing clients, adding 0's unpredictably to either the quantity of products ordered or the unit prices, and inflating the value of the invoices. See Napor Deposition, pp 226:11-25, 227:2-13, Appendix 14. Based on these questions, additional issues of material fact are created by the execution of the Services

Agreement by and between Plaza and WRS, and the impact of that agreement on the amount of damages, properly payable by Defendant Herklotz on the guaranty.

Finally, it is significant to note that Jack Napor, at numerous points in his deposition, indicated that other WRS accounts were handled on a "cash only" basis, but that WRS, despite Plaza's dreadful payment history, not only continued to extend it credit, but failed to take any accounting action, such as cash-only orders, to abate or mitigate what have now become Defendant Herklotz's liabilities. See Napor Deposition, pp. 23:12-17, Appendix 19. Mr. Napor went so far as to boldly state during his deposition that since "they didn't have money to pay the old bill," moving them to a cash-only basis would be a waste of time – yet he continued to extend Plaza credit, all the while deepening Mr. Herklotz's liability. See Napor Deposition, pp. 85:5-14, Appendix 20. To make this situation even worse, Mr. Napor readily acknowledged that WRS continued to reproduce videos for Plaza after October 12, 1998, despite knowing that their business "was not growing," and that they "lacked capital to … get titles and promotions." See Napor Deposition, pp. 152:8-15, Appendix 21. Additionally, Mr. Napor admitted that, with other clients, he had exercised lien rights over the ownership of the tapes to collect monies owed. See Napor Deposition, pp. 52:5-25, Appendix 22. But again, when it came to Plaza, he failed to take any such action. Additionally, Mr. Napor admitted that WRS had account representatives who were directly in charge of many individual clients for

WRS, yet Plaza, who was WRS' largest outstanding account balance, did not have a specific account representative designated to it. See Napor Deposition, pp. 57:10-19, Appendix 23.

In other words, despite readily acknowledging that all signs indicated that the Titanic was sinking, WRS continued increasing the value of his open check on Defendant Herklotz's account, while taking no actions to mitigate those damages – actions that he freely admitted to taking with other problematic clients. That Plaza became WRS' largest creditor is no wonder, and to what extent WRS took these actions because of its own desperate need to raise capital in advance of its pending bankruptcy is a material issue of fact for trial in this matter.

D. The Legal Bills of Thomas E. Reilly, Esq. Create Material Issues of Fact that Preclude Summary Judgment

A significant portion of WRS' claim, nearly $100,000.00, is a request that Defendant Herklotz pay WRS' legal fees associated with the prosecution of this action. This portion of WRS' claim is in dispute, as even a cursory review of the itemized time entries by Mr. Reilly and his staff demonstrates that a significant number of those entries are not properly chargeable to Mr. Herklotz under any factual or legal theory. By way of example only, and not intending to be comprehensive, a large number of the entries appear to relate to general business advice rendered by Mr. Reilly to Mr. Napor and/or WRS and have nothing whatsoever to do with collection of amounts pursuant to the guaranty executed by Mr. Herklotz. (Affidavit of Thomas E. Reilly, Esquire, Appendix 17.)

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Taking only one sheet of Mr. Reilly's invoices, which are marked as pages 91 and 92, several entries appear that may not be subject to Mr. Herklotz's guaranty. For example, on 5/16/2006, Mr. Reilly bills Mr. Napor for a phone call "with Attorney Robert Lampl about Bankruptcy," an issue that is likely not covered by the guaranty. Additionally, on 5/23/2006, Mr. Reilly bills Mr. Napor for receipt of an email "from Jack Napor addressed to Joe Shields about Attorney Robert Lampl trying to get an extension to September 1 for the eviction." Again, whether this work is properly subject to coverage under Defendant Herklotz's personal guaranty is a question of material fact that requires resolution at trial.

IV. CONCLUSION

Based on the information previously outlined in this response, Defendant Herkotz denies that the amount asserted by WRS is supportable by the records at issue, or appropriate as a measure of damages against Defendant Herklotz. To the contrary, Defendant Herklotz has raised significant issues of material fact with regard to the accuracy of the records underlying the numbers asserted by Plaintiff, and examined by Schneider Downs, such that the reliability of the numbers themselves is seriously called into question. For these reasons, summary judgment regarding damages must be denied to WRS, and Defendant Herklotz must be entitled to his day in Court with regard to these issues.

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Respectfully submitted,

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